

IN THE UNITED STATES DISTRICT COURT
OR THE EASTERN DISTRICT OF CALIFORNIA

Defendant moves to dismiss Plaintiff's Complaint ("Complaint") under Federal Rule of Civil Procedure 12(b)(6) on the grounds that it is time-barred.¹ In the alternative, Defendant moves for summary judgment. Plaintiff opposes the motion.

* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

¹ Defendant also moves for dismissal under Federal Rule of Civil Procedure 12(b)(1). However, since Defendant has not shown that the motion raises a jurisdictional issue, the Rule 12(b)(1) motion need not be decided. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (where the Supreme Court held "that filing a timely charge of discrimination with the [Equal Employment Opportunity Commission] is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.")

1 I. Motion to Dismiss

2 Defendant seeks dismissal of Plaintiff's employment
3 discrimination claims alleged under the Rehabilitation Act of 1973.²
4 Specifically, Plaintiff alleges the following claims: "[d]isparate
5 treatment because of Plaintiff's [] disability"; that "Defendant
6 failed to provide a reasonable accommodation for Plaintiff's physical
7 disability"; that Defendant retaliated against her "for writing [] a
8 letter to the [Natural Resources Conservation Service ("NRCS")] State
9 Administrative Officer"; and that "Defendant constructively terminated
10 [her] by denying [her] request to transfer to another duty station."
11 (Compl. ¶¶ 4, 6.)

12 Dismissal is appropriate under Rule 12(b)(6) if Plaintiff
13 failed to (1) present a cognizable legal theory, or (2) plead
14 sufficient facts to support a cognizable legal theory. Robertson v.
15 Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984).
16 When considering the motion, all material allegations in the Complaint
17 must be accepted as true and construed in the light most favorable to
18 Plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Cahill v.
19 Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). In
20 addition, Plaintiff is given the benefit of every reasonable inference
21 that can be drawn from the allegations in the Complaint. Retail
22 Clerks Int'l Ass'n v. Shermahorn, 373 U.S. 746, 753 n.6 (1963).
23 Accordingly, the motion must be denied "unless it appears beyond doubt
24 that [Plaintiff] can prove no set of facts in support of [her] claim

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28 ² Plaintiff also alleges a claim for gender discrimination under Title VII. (See Compl. ¶¶ 3, 4.) However, in her Opposition, Plaintiff says "she is withdrawing any claims related to gender." (Opp'n at 19.)

1 which would entitle [her] to relief." Conley v. Gibson, 355 U.S. 41,
2 45-46 (1957).

3 Defendant argues that Plaintiff's Complaint must be
4 dismissed because she failed to consult with an Equal Employment
5 Opportunity ("EEO") counselor within the required forty-five days
6 prescribed in 29 C.F.R. § 1614.105(a).³ (Mot. at 5:10-13.)
7 Specifically, Defendant contends that "Plaintiff initiated contact
8 with an EEO counselor on February 27, 2001" for alleged
9 "discrimination [that] occurred in May 1992, . . . November 28, 2000
10 and December 18, 2000." (Id. at 5:20-22.) Defendant argues that even
11 considering the last date on which the alleged discriminatory activity
12 occurred, December 18, 2000, her consultation with the EEO counselor
13 was "twenty-five days late." (Id. at 6:16.)

14 Plaintiff counters arguing that "she first spoke to an EEO
15 counselor on January 3, 2001." (Opp'n at 10.) Plaintiff cites the
16 "EEO's Counselor Report," as support for this argument, which is
17 attached to her Opposition, and which states that the "date of action"
18 is "January 2001." (EEO Counselor's Report in Supp. of Opp'n at 5.)
19 Defendant rejoins that "[w]hile [P]laintiff contends that she spoke to
20 an EEO counselor in Davis, California, on January 3, 2001, and on
21 subsequent dates thereafter, [there is] no record of any such
22 contacts, in person or by telephone." (Reply at 2:4-7; see Decl. of
23 Rene Rodriguez in Supp. of Reply ¶¶ 3, 4 at 1 ("I am the only EEO
24 counselor that works in the Davis, California office . . . I do not
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26 ³ 29 C.F.R. § 1614.105(a)(1) provides that "[a]n aggrieved
27 person must initiate contact with a Counselor within 45 days of the date
28 of the matter alleged to be discriminatory or, in the case of personnel
action, within 45 days of the effective date of the action."

1 recall having any contact with [Plaintiff] regarding EEO matters.").)
2 Since a motion to dismiss must be denied "unless it appears beyond
3 doubt that [Plaintiff] can prove no set of facts in support of [her]
4 claim" and it is unclear whether Plaintiff timely contacted an EEO
5 counselor, Defendant's motion is denied. Conley, 355 U.S. at 45-46.

6 II. Summary Judgment⁴

7 Defendant also seeks summary judgment on Plaintiff's claims.
8 Plaintiff is legally blind.⁵ (Def.'s Statement of Undisputed Facts
9 ("SUF") ¶ 1.) In 1992, Plaintiff was hired by NRCS, an agency of the
10 United States Department of Agriculture, in Nebraska. (Id. ¶ 2.)
11 Plaintiff was transferred to Massachusetts and Washington, D.C. before
12 being placed as a Contract Specialist in Davis, California. (Id.
13 ¶¶ 3-5.) To help assist Plaintiff with her disability, NRCS provided
14 her with a reader for four hours a day and with computer equipment.
15 (Id. ¶¶ 6,7.) On October 13, 2000, Plaintiff wrote a letter to Mr.
16 J.R. Flores, NRCS's State Administrative Officer, "outlin[ing] her
17 lack of accommodation." (Pl.'s Statement of Disputed Facts ("SDF") at
18 4; see Letter to Mr. J.R. Flores in Supp. of Opp'n.) In response to

20 ⁴ The standards for summary judgment are well known and will
only be repeated as necessary herein.

21 ⁵ The undisputed facts in this section are based on Defendant's
22 Statement of Undisputed Facts, filed within its Motion. (See Mot. at 2-
23 5.) Plaintiff did not file a Statement of Undisputed Facts in response
24 to Defendant's Statement as required by Local Rule 56-260. (See L.R.
25 56-260, which provides that "[a]ny party opposing a motion for summary
26 judgment . . . shall reproduce the itemized facts in the Statement of
27 Undisputed Facts, and admit those facts that are undisputed and deny
28 those that are disputed") Plaintiff filed a Statement of
Disputed Material Facts within her Opposition. (See Opp'n at 2-9.) All
of the facts in Defendant's Statement of Undisputed Facts are undisputed
because Plaintiff failed to "present specific facts demonstrating that
there is a factual dispute" Zoslaw v. MCA Distrib. Corp., 693
F.2d 870, 893 (9th Cir. 1982).

1 Plaintiff's October 13 letter, "[o]n or about November 10, 2000, NRCS
2 hired the Sensory Access Foundation ("SAF"), an organization which
3 assists blind or visually impaired people to obtain or retain
4 employment by providing access to technology assessment, computer
5 training, job placement and accommodation services, to evaluate
6 [P]laintiff on the job and make recommendations on how she could be
7 better accommodated." (SUF ¶ 8.)

8 In November 2000, before SAF completed its report, NRCS's
9 Washington, D.C. office determined that certain positions would be
10 eliminated as they became vacated in an effort to streamline the
11 agency. (Id. ¶ 9.) Plaintiff's position was one of the three
12 positions in Davis to be eliminated. (Id.) However, "the positions
13 were to be maintained for as long as the employees stayed in the
14 positions; if the employees vacated the positions, then elimination
15 would take effect." (Id.) "On December 18, 2000, [P]laintiff's
16 husband, who also worked at NRCS in Davis, voluntarily accepted a
17 promotion to the Red Bluff Area Office." (Id. ¶ 12.) However,
18 "[t]here was no Contract Specialist position available in [Red Bluff]
19 to reassign [P]laintiff." (Id. ¶ 11.) Plaintiff moved to Red Bluff
20 with her husband and "requested a transfer to [the] Red Bluff
21 [office], or a nearby location, but there were no vacancies." (Id.
22 ¶¶ 13, 14.) Plaintiff signed an Employee Resignation Form on
23 December 20, 2000. (Id. ¶ 15.) Plaintiff's "resignation [was
24 nevertheless only made] effective as of January 2, 2002, approximately
25 one year later, in order for [P]laintiff to return to her job as a
26 Contract Specialist at the NRCS office in Davis if she chose before
27 that date." (Id. ¶ 14.)

1 A. Failure to Accommodate

2 Defendant seeks summary judgment on Plaintiff's failure to
3 accommodate claim asserting that "there is sufficient evidence to
4 demonstrate [its] good faith efforts undertaken . . . to accommodate
5 [P]laintiff's disability prior to her resignation in December 2000."
6 (Mot. at 8:4-6, 20-22.) Under the Rehabilitation Act of 1973,
7 "governmental employers [must] make reasonable accommodation to the
8 known physical or mental limitations of a qualified handicapped
9 applicant or employee unless the agency can demonstrate that the
10 accommodation would impose an undue hardship on the operation of its
11 program." Fuller v. Frank, 916 F.2d 558, 561 (9th Cir. 1990) (citing
12 29 C.F.R. § 1613.704(a)). "Determining whether an accommodation is
13 reasonable depends, to a significant extent, upon determining whether
14 the employer has acceded to the disabled employee's requests"
15 Feliberty v. Kemper Corp., 98 F.3d 274, 280 (7th Cir. 1996). Further,
16 "the 'legislative history makes clear that employers are required to
17 engage in an interactive process with employees in order to identify
18 and implement appropriate reasonable accommodations.'" Hadley v. Wal-
19 Mart Stores, Inc., 2001 WL 34039486, at *6 (D. Or. Nov. 19, 2001)
20 (citing Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1101 (9th Cir.
21 2000)). "Generally, the interactive process 'is triggered [] by a
22 request for accommodation by a disabled employee.'" Id. (citing
23 Barnett, 228 F.3d at 1112). "Once the interactive process has been
24 triggered, the employer must make a reasonable effort to identify the
25 precise limitations resulting from the disability and the potential
26 reasonable accommodations that could overcome those limitations."
27 Sicoli v. Nabisco Biscuit Co., 2000 WL 1268255, at *3 (E.D. Pa. Aug.
28 30, 2000).

1 It is undisputed that Defendant commenced a process of
2 ascertaining if Plaintiff could be better accommodated in response to
3 her October 13, 2000 letter. (See Mot. at 9:1-3; see also Opp'n at
4 14, in which Plaintiff acknowledges that as a result of her letter to
5 Mr. Flores, NRCS hired SAF to conduct a full analysis of her
6 accommodation needs.) Specifically, NRCS hired SAF to evaluate
7 Plaintiff's situation and make recommendations as to how Plaintiff
8 could be better accommodated. (Mot. at 9:1-3; Decl. of Sharon Bost in
9 Supp. of Mot. ("Bost Decl.") ¶ 10.) Plaintiff resigned prior to the
10 completion of the SAF report. (See Mot. at 9:1-3, 16-19; Bost. Decl.
11 ¶¶ 15, 17; Ex. G, Aff. of Sharon Bost in Supp. of Mot. at 251.)

12 Although Plaintiff argues that her "requests for reasonable
13 accommodation were not granted" she does not support this argument
14 with evidence of specific requests made to NRCS prior to the October
15 13 letter she sent to Mr. Flores. (See Opp'n at 15.) Plaintiff
16 points to her own affidavit and that of Cathy Murtha, "an outside
17 trainer from the Sacramento Society for the Blind," to support her
18 failure to accommodate claim.⁶ (Id. at 14.) Plaintiff states that
19 she had computer problems and "trouble getting adequate reader time."
20 (Id. at 13; Aff. of Brenda Sanden in Supp. of Opp'n ("Sanden Aff.") at
21 150-55, 156-58.) In addition, although Plaintiff states "that [NRCS]
22 would not listen to [Cathy Murtha's] [accommodation] recommendations,"
23 Ms. Murtha's affidavit states that she did not talk "to management

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⁶ Plaintiff also cites to her expert, Dr. Frederic K. Schroeder,
26 in support of her failure to accommodate claim. However, his
27 propositions, that had Plaintiff been given better computer
28 accommodations she would have received better evaluations and that
managers very rarely understand the needs of blind workers, are not
relevant on the issue whether Plaintiff made requests for accommodation
to NRCS before her October 13 letter. (See Opp'n at 15.)

1 about [Plaintiff's] problems" because Plaintiff asked her not to, and
2 she also "didn't submit a written report." (Opp'n at 14; Aff. of
3 Cathy Anne Murtha in Supp. of Opp'n ("Murtha Aff.") at 300.)

4 Accordingly, since there is no genuine issue of material
5 fact that NRCS was in the process of ascertaining how it could respond
6 to Plaintiff's request for accommodation when she left her position in
7 Davis and moved to Red Bluff with her husband, Defendant's motion for
8 summary judgment on the failure to accommodate claim is granted. See
9 Rennie v. United Parcel Serv., 139 F. Supp. 2d 159, 172-73 (D. Mass.
10 2001) (stating that plaintiff's resignation from her employment before
11 her employer could evaluate her request to be reasonably accommodated
12 constituted "a complete failure [on plaintiff's part] to continue to
13 engage in the interactive process and prevented [her employer] from
14 making any further attempts to reasonably accommodate her [;
15 consequently plaintiff could not] prove that [her employer] failed to
16 accommodate her."); see also Witt v. N.W. Aluminum Co., 117 F. Supp.
17 2d 1127, 1133 (D. Or. 2001) ("[S]ummary judgment [on a failure to
18 accommodate claim may be granted] where there is no genuine dispute
19 that the employer has engaged in the interactive process in good
20 faith.")

21 B. Disability Discrimination

22 Defendant also seeks summary judgment on Plaintiff's
23 disability discrimination claim arguing that "Plaintiff cannot
24 establish that she was the subject of an adverse action by NRCS and
25 that she was treated adversely because of her disability." (Mot. at
26 14:9-11.) Further, Defendant contends that even assuming "[P]laintiff
27 could meet her *prima facie* burden" on this claim, NRCS has
28 "legitimate, nondiscriminatory reasons for its actions." (Id. at

1 15:22, 27.) Plaintiff responds that NRCS's "unwillingness to secure
 2 [Plaintiff's] transfer [to the Red Bluff area] is tied directly to
 3 [Plaintiff's] disability." (Opp'n at 16.) Plaintiff argues that "all
 4 married couples who worked for the agency of which she was aware were
 5 able to secure transfers as a 'package deal.'" (Id.) Plaintiff
 6 points to the affidavit of Sarah Chavez-Magalang, who avers that
 7 "[n]ormally when a married person is transferred, they find a job for
 8 the spouse" and that she "believe[d] that [management] could have
 9 found a place for [Plaintiff] to work [in Red Bluff]." (Aff. of Sarah
 10 Chavez-Magalang in Supp. of Opp'n at 293, 292.) However, belief alone
 11 is insufficient to create a genuine issue of material fact. Columbia
 12 Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc., 944 F.2d
 13 1525, 1529 (9th Cir. 1991) (finding that a declarant stating "I
 14 believe" is insufficient when speculating as to motivation behind
 15 decision).

16 Plaintiff also argues that "work existed in the Red Bluff
 17 region that she could have performed." (Opp'n at 17.) In support of
 18 this assertion, Plaintiff argues that Barbara Ammon "who worked in the
 19 Red Bluff region actively sought information from [Plaintiff]
 20 regarding how a back log of contract work could be handled[,] and
 21 that "[t]his evidences the need for a contract specialist in that
 22 region." (Id. at 16-17; see Sanden Aff. at 166-69.)⁷ Plaintiff also
 23 argues that "Robert Bailey, a lead person for the Red Bluff region, []

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 25 ⁷ Defendant objects to Plaintiff's reference to the statements
 26 made by Barbara Ammon, arguing that they are hearsay, and to the "double
 27 hearsay statements of Sarah Chavez-Magalang . . . whose [affidavit]
 28 . . . is unsigned and therefore inadmissible." (Reply at 9:20-21, n.9)
 These objections are sustained. See Mason v. Clark, 920 F.2d 493, 495
 (8th Cir. 1990) ("We have no hesitation in stating that an unsigned
 affidavit is not sufficient evidence [to defeat] a motion for summary
 judgment.").

1 expressed interest in creating a new administrative position to
2 support him and his team." (Opp'n at 17.) Plaintiff argues that
3 "[h]e interviewed [her] and was very excited about hiring her, but all
4 that changed once he consulted with individuals in the state office."
5 (Id.) Plaintiff supports this argument with her averment that she
6 "suspect[ed] that when Mr. Bailey contacted management in the State
7 Office, he was told about [her] complaint and accommodation issues and
8 they told him they didn't want to deal with [her] any longer."
9 (Sanden Aff. at 167.) (emphasis added). Such speculation is not
10 evidence sufficient to create a genuine factual dispute. See Columbia
11 Pictures Indus., Inc., 944 F.2d at 1529.

12 "To establish a prima facie case of disability
13 discrimination, a plaintiff must show (1) [s]he is disabled within the
14 meaning of the statute; (2) [s]he is otherwise qualified for the
15 position; (3) [s]he was adversely treated because of h[er] disability;
16 and (4) [s]he worked for the federal government." Wilborn v.
17 Ashcroft, 222 F. Supp. 2d 1192, 1207 (S.D. Cal. 2002) (citing Reynolds
18 v. Brock, 815 F.2d 571, 573-74 (9th Cir. 1987)). If Plaintiff can
19 establish a prima facie case of disability discrimination, "the burden
20 shifts to the defendant to articulate a legitimate, non-discriminatory
21 reason for the employment decision. The burden then shifts back to
22 the plaintiff to produce evidence sufficient to allow a reasonable
23 factfinder to conclude that defendant's articulated reason is
24 pretextual." Id. "In other words, [] plaintiff 'must tender a
25 genuine issue of material fact as to pretext in order to avoid summary
26 judgment.'" Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir.
27 1983) (quoting Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir.
28 1983)). Therefore, "when evidence to refute the defendant's

1 legitimate explanation is totally lacking, summary judgment is
2 appropriate even though plaintiff may have established a minimal prima
3 facie case." (Id. at 890-91.)

4 Assuming, *arguendo*, that Plaintiff has established a prima
5 facie case, Defendant has successfully demonstrated a legitimate
6 nondiscriminatory reason for NRCS's actions. Specifically, Defendant
7 asserts, with supporting evidence, that "[t]he decision to create a
8 new staffing plan for the consolidation of the administrative staffs
9 of three agencies was a National Headquarters project independent of
10 any involvement of [P]laintiff's supervisors at the NRCS office in
11 Davis." (Mot. at 15:27-28, 16:1-2; see Bost Decl. ¶ 11; Ex. A, Aff.
12 of Jeffrey Vonk in Supp. of Mot. at 180; Ex. B, Aff. of Henry C. Wyman
13 in Supp. of Mot. at 188.) Defendant also contends, with supporting
14 evidence, that "[P]laintiff was not transferred or reassigned to Red
15 Bluff, or a nearby location, because no vacant positions existed" and
16 "[h]ad [Plaintiff] not moved from Davis, her Contract Specialist
17 position would have not have been eliminated." (Mot. at 16:4-5, 15:5-
18 6; see Bost Decl. ¶¶ 13, 11.) Defendant also states that it "has no
19 [] custom or policy of keeping spouses together when one spouse
20 transfers to another office." (Reply at 9:14-15, n.9; see Bost. Decl.
21 in Supp. of Reply ¶ 3.)

22 Plaintiff has not provided substantial evidence refuting
23 Defendant's legitimate explanations. Accordingly, Defendant's motion
24 for summary judgment on Plaintiff's disability discrimination claim is
25 granted. See Wallis, 26 F.3d at 890 ("'[A] plaintiff cannot defeat
26 summary judgment simply by making out a prima facie case'" and
27 "'[plaintiff] must do more than establish a prima facie case and deny
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1 the credibility of the [defendant's] witnesses.'") (internal citations
2 omitted).

3 C. Constructive Discharge Claim

4 Defendant argues that "Plaintiff cannot establish a prima
5 facie case of constructive discharge because she does not even
6 intimate that she was subjected to a hostile work environment or that
7 she was compelled to resign because the working conditions at the NRCS
8 office in Davis were so intolerable that a reasonable person likewise
9 would have felt compelled to resign." (Mot. at 17:14-17.) Plaintiff
10 introduces the same arguments and supporting evidence as she did in
11 response to Defendant's motion for summary judgment on Plaintiff's
12 disability discrimination claim, arguing that "[b]ecause there was no
13 transfer, she was forced to resign" and "the lack of accommodations
14 made it very difficult for [Plaintiff] to do her job and advance
15 within the organization." (Opp'n at 16.)

16 "'A constructive discharge occurs when a person quits his
17 job under circumstances in which a reasonable person would feel that
18 the conditions of employment have become intolerable.' Thus, an
19 employee need not demonstrate that his employer intended to force him
20 to resign, but merely that his conditions of employment were
21 objectively intolerable." Lawson v. Wash., 296 F.3d 799, 805 (9th
22 Cir. 2002) (quoting Draper v. Coeur Rochester, 147 F.3d 1104, 1110
23 (9th Cir. 1998)). Plaintiff has not shown that her conditions of
24 employment were so intolerable as to force her to resign in light of
25 her indication that she "applied for a transfer so that she could
26 remain with the agency and transfer with her husband." (Opp'n at 8.)
27 Accordingly, summary judgment on the constructive discharge claim is
28 granted.

1 D. Retaliation

2 Defendant seeks summary judgment on Plaintiff's retaliation
3 claim, arguing that Plaintiff cannot make a prima facie case of
4 reprisal and that it "articulates legitimate, nondiscriminatory
5 reasons for its actions." (Mot. at 18:6-12, 19:5-6.) Plaintiff
6 contends that "the evidence . . . shows that [Plaintiff] was the only
7 one not reassigned when the new staffing plan came out[,] that she did
8 not receive a transfer to the Red Bluff region[,] and that "[a]ll of
9 this occurred shortly after the issuance of her [October 13, 2000]
10 memo wherein she complained of her lack of accommodation." (Opp'n at
11 18.)

12 "To make out a prima facie case [of retaliation, Plaintiff]
13 must establish that she acted to protect her [] rights, that an
14 adverse employment action was thereafter taken against her, and that a
15 causal link exists between these two events." Steiner v. Showboat
16 Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994). Once Plaintiff has
17 made a prima facie case, "[t]he burden of production then shifts to
18 [Defendant] to advance legitimate, non-retaliatory reasons for any
19 adverse actions taken against [Plaintiff]; she has the ultimate burden
20 of showing that [Defendant's] proffered reasons are pretextual." Id.

21 Even assuming that Plaintiff has made a prima facie case on
22 her retaliation claim, Plaintiff has not introduced substantial
23 evidence to rebut Defendant's legitimate reasons for NRCS's actions.
24 (See Mot. at 15:27-28, 16:1-2, 4-5, 15:5-6 and supporting evidence
25 ("The decision to create a new staffing plan for the consolidation of
26 the administrative staffs of three agencies was a National
27 Headquarters project independent of any involvement of [P]laintiff's
28 supervisors at the NRCS office in Davis"; "[P]laintiff was not

1 transferred or reassigned to Red Bluff, or a nearby location, because
2 no vacant positions existed"; "[h]ad [Plaintiff] not moved from Davis,
3 her Contract Specialist position would have not have been
4 eliminated.".) Therefore, Defendant's motion for summary judgment on
5 Plaintiff's reprisal claim is granted.

6 CONCLUSION

7 For the reasons stated, Defendant's motion to dismiss is
8 denied and Defendant's motion for summary judgment is granted. The
9 clerk shall enter judgment for Defendant.

10 Dated: March 27, 2007

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12 GARLAND E. BURRELL, JR.
13 United States District Judge

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